1962

# The Metropolitan Water District of Salt Lake City v. Salt Lake City et al : Brief of Appellants

Utah Supreme Court



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# IN THE SUPREME COURT
# of the
# STATE OF UTAH

THE METROPOLITAN WATER DISTRICT OF SALT LAKE CITY, a corporation,

*Plaintiff, Respondent and Cross-Appellant,*

vs.

SALT LAKE CITY, a Municipal Corporation; J. BRACKEN LEE; L. C. ROMNEY; JOE L. CHRISTENSEN; CONRAD B. HARRISON; HERBERT F. SMART; and THORPE B. ISAACSON,

*Defendants, Appellants and Cross-Respondents.*

Case No. 9660

## APPELLANTS' BRIEF

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Merrill C. Faux, Judge

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## STATEMENT OF THE NATURE OF CASE

This is an action by the plaintiff Metropolitan Water District of Salt Lake City for a declaratory judgment interpreting the provisions of the Metropolitan Water District Act (Chapter 8, Title 73, Utah

Code Annotated, 1953) in order to determine the validity of the appointment of Thorpe B. Isaacson to the Board of Directors of plaintiff replacing Charles C. Freed, whose alleged term had expired, and the action raises two principal questions:

(1) What is the term of office of members of the Board of Directors of plaintiff Metropolitan Water District of Salt Lake City, Utah?

(2) What is the method of appointment of Directors to said Board?

## DISPOSITION IN LOWER COURT

Upon the motions of the respective parties for Summary Judgment in their favor, the lower court determined in accordance with defendants' contentions that the Board of Commissioners of Salt Lake City has the power to fix the term of office of directors of the Metropolitan Water District, that it has properly fixed this term at four years by ordinance, and that, consequently, the term of office of Director Charles C. Freed has expired. However, the court, against the contentions of defendants, held that the power to nominate directors to the Board of Directors of plaintiff Metropolitan Water District of Salt Lake City was vested in the Board of Commissioners of Salt Lake City rather than in the Mayor subject to confirmation by the Board of Commissioners, that the purported appointment of Thorpe B. Isaacson was null and void, and that Charles

C. Freed may continue to hold office until his successor is duly appointed by the Board of Commissioners of Salt Lake City. The court also declared invalid a portion of Section 22-1-2 of the Revised Ordinances of Salt Lake City, Utah, 1955, which purports to give the Mayor nominating authority with confirming authority in the Board of Commissioners of Salt Lake City. The court thereupon refused to issue a Writ of Mandamus compelling plaintiff to seat Thorpe B. Isaacson on plaintiff's Board of Directors as requested by defendants.

## RELIEF SOUGHT ON APPEAL

Defendants appeal from that portion of the lower court's determination which holds that the power to nominate directors is in the Board of Commissioners of Salt Lake City and that Thorpe B. Isaacson was not validly appointed. Defendants ask that these determinations be reversed and that this court declare that the power to nominate directors to plaintiff Metropolitan Water District of Salt Lake City is in the Mayor of Salt Lake City subject to confirmation by the Board of Commissioners of Salt Lake City in accordance with Section 73-8-20, Utah Code Annotated, 1953, and Section 22-1-2 of the Revised Ordinances of Salt Lake City, Utah, 1955, and respectfully request this court to hold that the appointment of Thorpe B. Isaacson was in all respects valid and proper. Defendants also request that this court issue a Writ of Mandamus compelling the plaintiff Metropolitan Water District to

seat Thorpe B. Isaacson on its Board of Directors. Plaintiff cross appeals from that portion of the determination of the lower court which holds that the Board of Commissioners of Salt Lake City has power to fix a term of office of the directors of plaintiff, from the holding that said term was properly fixed at four years, and from the holding that the term of Charles C. Freed has expired.

## STATEMENT OF FACTS

The plaintiff Metropolitan Water District of Salt Lake City was organized in 1935 pursuant to statutory authority granted in the original Metropolitan Water District Act enacted by Chapter 110 of the Laws of Utah, 1935. The constitutionality of said act was tested and upheld in the dual cases of *Lehi City v. Meiling,* 87 Utah 237, 48 P.2d 530, and *Provo City v. Evans,* 87 Utah 292, 48 P.2d 555. The Metropolitan Water District of Salt Lake City was organized with the same geographical limits as Salt Lake City itself and consequently, plaintiff includes the area of only one municipality. The section of the original act relating to appointment to Board of Directors is now found in Section 73-8-20, Utah Code Annotated, 1953, and insofar as this law suit is concerned it is in all respects identical to the original section. The section provides in part:

> "All powers, privileges and duties vested in or imposed upon any district incorporated hereunder shall be exercised and performed by and

through a board of directors; provided, however, that the exercise of any and all executive, administrative and ministerial powers may be by said board of directors delegated and redelegated to any of the offices created hereby or by the board of directors acting hereunder.

"In the event that the district shall be organized to comprise the area of two or more cities, the board of directors herein referred to shall consist of at least one representative from each municipality, the area of which shall lie within the metropolitan water district. *Such representatives* shall serve without compensation from the district and *shall be designated and appointed by the chief executive officers of municipalities, respectively, with the consent and approval of the governing bodies of the municipalities, respectively.* * * *

*"If any district shall include the area of only one municipality then the board of directors shall consist of such number as the governing body of that municipality shall determine. All provisions of this section appropriate shall apply to such board."* (Emphasis added.)

In furtherance of the authority granted by this section, the Salt Lake City Board of Commissioners on September 12, 1935, adopted an ordinance designating the number, tenure of office and classifications of the members of the Board of Directors of the Metropolitan Water District of Salt Lake City. (R. 55). This ordinance provided that the Board shall consist of seven (7) members "one of whom shall be the Commissioner of Water Supply and Waterworks of Salt

Lake City and six (6) of whom shall be appointed by the Mayor and approved by the Board of Commissioners of Salt Lake City." (R. 55). This ordinance was repealed in 1941, and a new ordinance enacted which changed the number of members of the Board of Directors to five (5) and provided "one of whom shall be the Commissioner of Water Supply and Waterworks of Salt Lake City and four (4) of whom shall be appointed by the Mayor subject to the approval and confirmation of the Board of Commissioners of Salt Lake City." (R. 56-58). This ordinance was re-enacted in the Revised Ordinances of Salt Lake City, Utah, 1955, as Section 22-1-2. (R. 59). Since 1935, all appointments to the Board of Directors of plaintiff have been made by the Mayor and have been approved and confirmed by the Board of Commissioners, and until this controversy arose, it was generally assumed by both parties that the power to appoint directors to plaintiff was in the Mayor subject to approval by the Board of Commissioners pursuant to both statutory and ordinance authority. (R. 24-26). For example, in 1936, a dispute arose concerning the appointment of Mr. Blair Richardson to the Board of Directors. The facts surrounding this dispute are not indicated by the minutes of the Salt Lake City Commission, but Mayor Erwin's nomination of Mr. Richardson was defeated twice on September 30th and October 1st before being finally confirmed on October 6, 1936. (R. 25-27). This serves merely to illustrate the fact that since the inception of the district until this dispute arose, no one questioned the right

of the Mayor to make the nomination to the Board of Directors of the district.

In accordance with this unquestioned administrative practice of long standing, the nomination of the incumbent Charles C. Freed was made by the Mayor and confirmed by the Commission. On June 18, 1958, Mayor Stewart recommended that Charles C. Freed be appointed to fill the unexpired term of Royden G. Derrick, for a term ending June 19, 1961. This appointment was confirmed by the Board of Commissioners as recommended with a unanimous vote. (R. 45-46).

As the end of the term of Charles C. Freed was approaching, Mayor J. Bracken Lee made the following recommendation on June 15, 1961:

> "From Mayor:
>
> "Gentlemen:
>
> I respectfully request that Mr. Oscar K. Carlson of 2142 St. Mary's Drive here in Salt Lake City be appointed to the Board of Directors of the Metropolitan Water District. His term is to be effective immediately and run the prescribed four years until June of 1965. Mr. Carlson's appointment will fill the vacancy caused by the expired term of Mr. Charles Freed.
>
> J. Bracken Lee."

This nomination failed of confirmation by a vote of two in favor and three against. (R. 49-50). On June 20, 1961, the Mayor nominated Julian Bamberger to

the Board of Directors of the Metropolitan Water District and his nomination was approved by a vote of four to one. (R. 50). Mr. Bamberger subsequently refused to accept the position and on August 3, 1961, the Mayor nominated Thorpe B. Isaacson, one of the defendants named herein, to the Board of Directors. His nomination was approved by a vote of four to zero, with one member abstaining. The city commission minutes of August 3, 1961, reflect this action as follows:

> "From Mayor:
>
> "Gentlemen:
>
> I respectfully request that Bishop Thorpe B. Isaacson of 4331 Beacon Drive here in Salt Lake City be appointed to the Board of Directors of the Metropolitan Water District. His term is to be effective immediately and run the prescribed four years until June of 1965. Bishop Isaacson's appointment will fill the vacancy caused by the expired term of Mr. Charles Freed.
>
> J. Bracken Lee, Mayor
>
> "Mr. Harrison stated that he would not vote on any appointment to the Metropolitan Water District Board to replace Mr. Freed. 'I do not feel that I should vote against a good man and I cannot vote for the replacement or dismissal of Mr. Freed from this Board.'
>
> "Mr. Lee moved that the report be filed, that the appointment be approved, effective immediately and to run the prescribed four years until June of 1965, which motion carried, all members voting aye, except Mr. Harrison, who did not vote.

"Upon motion of Mr. Smart, the Board of Commissioners adjourned.

/s/ J. BRACKEN LEE, Mayor

/s/ HERMAN J. HOGENSEN
City Recorder" (R. 51).

This law suit was filed by plaintiff shortly thereafter to determine the validity of this appointment. On October 13, 1961, a motion of plaintiff for Judgment on the Pleadings was denied by the District Court. At a later date, plaintiff and defendants joined in respective motions for Summary Judgment resulting in the trial court's Preliminary Memorandum Decision on the 9th of February, 1962. (R. 63-66). The Court determined in his Memorandum Decision that the power to nominate members of the Board of Directors of the Metropolitan Water District was in the entire City Commission rather than in the Mayor, and he suggested that another hearing for further argument be arranged. Pursuant to this further argument and hearing the trial court entered a Summary Judgment on March 30, 1962, in which he ruled as heretofore stated. (R. 68-69).

In this brief by defendants, appellants and cross-respondents only the points raised by defendants' Notice of Appeal will be discussed and argued. Defendants, appellants and cross-respondents will file a Cross-Respondents' brief in answer to the expected argument of plaintiff and cross-appellant on the points raised by plaintiff by way of cross appeal.

## ARGUMENT

### POINT I

### UNDER SECTION 73-8-20, U.C.A., 1953, MEMBERS OF THE BOARD OF DIRECTORS OF PLAINTIFF ARE TO BE NOMINATED BY THE "CHIEF EXECUTIVE OFFICER" OF SALT LAKE CITY.

The trial court erroneously determined that the portion of the statute relating to appointment by the chief executive officer with the consent and approval of the governing body did not apply to districts that comprise the area of only one city. The court in making this determination stated that inasmuch as the governing body of the municipality in single-city districts was to determine the number of the representatives of the city on the board of directors of said districts, they were also to determine the appointment of the directors. It held that the last sentence of the statute wherein it provides that "all provisions of this section appropriate shall apply to such board" was meaningless insofar as it relates to the method of appointment of directors. It is interesting to note that neither the plaintiff nor the defendants urged this construction of section 73-8-20 upon the trial court. This interpretation was not briefed or argued and is the trial court's own novel interpretation of the statute. It will be seen at once that to construe the statute in such manner strains the imagination and is an unusual construction of legislative intent, for there is nothing in the statute anywhere to indicate that the legislature intended that the method of appoint-

ment to a single-city district should be any different than the method of appointment to a multiple-city district. It should be readily apparent that no such result was intended by the legislature. A small change of facts in the instant case will demonstrate the lack of logic in the trial court's interpretation of the statute. If, in this case, Salt Lake City had chosen to join with South Salt Lake, Murray, or some other city in the creation of a district rather than to form it individually, then the method of appointment would be by the chief executive officer with the consent and approval of the governing body, but since plaintiff is a single-city district, then the regular methods of appointment do not apply. Such a distinction finds no support in the act for the act provides that "*all* provisions appropriate" shall apply, and the burden should be on plaintiff to show that the method of appointment is not a provision appropriate, which burden was never sustained by them in the lower court. Such distinction as made by the lower court is also without reasonable basis, for any reason that there may be to have the entire governing body do the nominating in a single-city district applies with equal and possibly even greater force to a multiple-city district. The clear expression of the applicability of the method of appointment set forth in the statute should be applied to appointments to the board of directors of plaintiff.

In reaching its conclusion, the court declared invalid a portion of Title 22 of the Revised Ordinances of Salt Lake City, Utah, 1955, wherein the Board of Commissioners of Salt Lake City had followed the

clear mandate of section 73-8-20 and authorized the Mayor to nominate members to the board of directors of the Metropolitan Water District subject to approval and confirmation by the Board of Commissioners. This provision of the ordinances, or one substantially similar, had been in effect since the incorporation of the district in 1935. In declaring this ordinance invalid the lower court said:

> "... This gratuitous procedural rule engrafted onto an initiatiatory ordinance is incompatible with the third paragraph of the statute; is not essential to give effect to the Title as a whole and finally puts a function into the mayor's hands which the statute intended to place in the hands of the city commission. So, it is declared to be contrary to the statute upon which it rests, to be surplusage in said second section of the ordinance and, by its deletion, not to invalidate said Title 22 of the ordinances of Salt Lake City." (R. 64-65).

The ruling of the trial court obviously ignored the proper background and framework of authorized judicial construction of statutes and ordinances. It is the universal rule that ordinances lawfully and regularly passed are presumed to be valid and not invalid and that this presumption is strengthened by a lack of challenge to the ordinance for many years. This proposition is well stated by McQuillan, *Municipal Corporations,* Vol. 6, Sec. 20.06, p. 13, as follows:

> "Consistently with judicial respect for the separation of powers in our government, as discussed above, there are presumptions of the rea-

sonableness and constitutionality of ordinances; indeed, there ordinarily is a presumption of validity of ordinances in all respects. At least, when offered in proof in proper form, an ordinance is presumed to be valid where it has reference to a subject matter which is within the corporate jurisdiction, unless the contrary appears on the face of the ordinance itself. But it has been said that this presumption, however strong, is not so conclusive as might be supposed. In the last analysis, it means only that municipal legislative action will be sustained if it is possible to sustain it under any reasonably supposable state of facts. While it has been asserted that the same presumption does not exist respecting the regularity of the passage of an ordinance as in the case of an act of the legislature, it has been observed, on the contrary, that 'every presumption obtains in favor of the validity of an ordinance that there is in favor of the validity of an act of the legislature.'

*"The fact that a law is long acquiesced in by the public and treated as valid by various governmental departments generally strengthens the presumption of its constitutionality."* (Emphasis added.)

See also Rhyne, Municipal Law, Sec. 9-10, page 238.

As will be hereinafter demonstrated, it seems that the trial court in this case sought a way to overturn this ordinance rather than a method to uphold it, for it gave no credence to the long-continued administrative practice and history involved, it failed to give effect to the estoppel arising against the present members of the board of directors of plaintiff, and it, inconsistently

with its own reasoning, upset the determination of the city commission of the method of appointment.

The contemporaneous construction of the statute and the long-continued administrative practice and procedure regarding the statute and ordinance is alone sufficient to sustain the conclusion that the Salt Lake City ordinance declared invalid by the trial court is the correct and logical interpretation of the statute. Such construction and practice is entitled to great weight and should not be overturned unless *clearly* erroneous. In the case of *Bowman v. Eldher,* 369 P.2d 977 at p. 978, the Colorado Supreme Court concisely stated this general rule as follows:

> "It is our function in interpreting statutes or charter provisions to ascertain and carry out the intent of the framers thereof. Contemporaneous construction of legislation, acquiesced in for many years by the authorities charged with its enforcement, is entitled to great weight in determining the intent of the framers. In the absence of clear error such a long established construction should not be overturned or disregarded by this Court."

Justice Sutherland makes an equally strong statement in his text on *Statutory Construction,* 3rd Edition, wherein, relating to the conclusiveness of contemporaneous and practical construction, he states in sections 5103 and 5104, Vol. II, pages 512-515, as follows:

> "Long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and en-

forcement, the courts, and the public constitutes an invaluable aid in determining the meaning of a doubtful statute * * *

"The conclusiveness of a contemporaneous and practical interpretation will depend upon a number of additional elements that give efficacy to the rule. In general, these elements are: (1) That the interpretation originated from a reliable source; (2) That the interpretation has continued for a long period of time and received wide acceptation, and (3) That the interpretation was made at or near the time of the enactment of the statute. Where these factors are present the vagueness usually surrounding the other aids of construction are not present, and therefore the rule serves as one of the most definite and reliable sources of statutory meaning."

In this case the contemporaneous and practical construction fulfills all the elements set forth in Sutherland. The interpretation arose from both the Board of Commissioners of Salt Lake City and the Metropolitan Water District, certainly reliable sources, within the context of the quote; the interpretation was made simultaneously with the adoption of the act and the creation of the district in 1935; the interpretation has continued ever since and has received universal acceptance until the advent of the present controversy. Such interpretation should be well-nigh conclusive in the absence of manifest error which has never been shown to exist by plaintiff or any other person.

Plaintiff is also estopped to assert anything contrary to this interpretation. Each appointment to plain-

tiff's board of directors has been made pursuant to Title 22 of the Revised Ordinances of Salt Lake City, Utah, 1955, and each of them has accepted all the benefits of appointment thereunder. It would seem, therefore, that all of plaintiff's contentions are vulnerable to the proposition that one who has accepted benefits under a statute or ordinance is ordinarily powerless to question its validity. In *Salt Lake City Lines v. Salt Lake City,* 6 Utah 2d 428, 315 P.2d 859, this court said:

> "Throughout the entire history of this matter the company, without protest of any kind and without any claim that the ordinances were invalid, has assumed the burdens and accepted the benefits of all three. Now, for the first time, it urges that the 1951 ordinance is invalid, . . .
>
> "All of the contentions mentioned seem to be vulnerable to the general proposition that one accepting the benefits of legislation, ordinarily is speechless in denouncing its validity, even on constitutional grounds."

The words of this court apply to plaintiff in respect to its contentions in this case with equal force, for each member of plaintiff's board of directors has accepted the benefits of office under said ordinance and statute, and now for the first time challenges the validity of said ordinance, seeking to perpetuate himself in those benefits arising from his individual acceptance of appointment thereunder. As a matter of fact, plaintiff takes a strange position in this case, for if defendant Isaacson has not been validly appointed, neither has any other member of the board of directors of plaintiff district,

including the incumbent Charles C. Freed, for all appointments to said board were made in the identical manner as the appointment of defendant Isaacson. This fact is clearly shown without any room for argument in the motion of defendants for summary judgment and the affidavits attached thereto.

## POINT II.

### THE MAYOR IS THE "CHIEF EXECUTIVE OFFICER" OF SALT LAKE CITY.

It should be noted that the lower court never actually determined this point inasmuch as it held that the provisions of the statute relating to appointment by the chief executive officer was not applicable to single-city districts. However, since this court should determine that this portion of the statute is applicable to plaintiff in accordance with defendants' argument under Point I, then the court must determine who is the "chief executive officer" of Salt Lake City. Plaintiff throughout the hearings on the respective motions in this case argued that the mayor was not such, since Salt Lake City is a city of the first class operating with a commission form of government. Plaintiff's argument was that the Board of Commissioners was Salt Lake City's "chief executive officer." Such argument does violence to the language of the statute, for it renders meaningless certain portions of the statute. This can be readily illustrated by a substitution of words in the statute itself. If the statute were to read in accordance with

the contentions of plaintiff, it would read "such representatives shall be designated and appointed by the Board of Commissioners with the consent and approval of the Board of Commissioners," and the last section would be simply repetitious. But for the statute to read in accordance with defendants' contentions that "such representatives shall be designated and appointed by the Mayor with the consent and approval of the Board of Commissioners" would give effect to all the language in the statute. In the case of *Stevenson v. Salt Lake City*, 7 Utah 2d 28, 317 P.2d 597, this court held that every word of a statute must be given effect, if possible to do so. In that case the question was whether the word "prohibit" meant something other than "suppress." This court held that since the word "prohibit" was used in conjunction with the word "suppress" in one section of the statute and the word "suppress" was used alone in another section of the statute, the two words were not synonymous and the power to "suppress" did not include authority to "prohibit." So in this case to give effect to all the language in section 73-8-20 someone other than the Board of Commissioners must be the "chief executive officer" of a first class city for there can be no doubt that it is the "governing body." The only possible person to whom the act could refer as "chief executive officer" is the mayor of Salt Lake City. It is true that in Salt Lake City the mayor does not have the executive and administrative power that a person with the same title may have in a different type government, but that by statute the mayor's office

has been made a more important office than the office of commissioner admits of no argument. Sections 10-6-1 and 10-6-7, U.C.A., 1953, provide that the mayor shall be elected separately from the other commissioners; section 10-6-41 authorizes a higher salary for the mayor than for the other commissioners; section 10-6-33 gives the mayor the authority to approve the bonds of the other commissioners. In addition, Section 10-6-13, U.C.A., 1953, provides that the mayor is to be the chairman of the Board of Commissioners and shall sign all resolutions and ordinances passed by the board. According to Webster's Unabridged Dictionary, one of the definitions of execute is to sign and deliver, and at least in this term of reference, the mayor is the "chief" executive officer of Salt Lake City. Statutes must be interpreted in accordance with their most reasonable interpretation, and the mere fact that the mayor's office does not encompass all authority that is ordinarily contemplated in connection with the term "chief executive" should not deter this court from interpreting the act in accordance with its most reasonable construction. *In City of Clifton v. Zweir,* 36 N.J. 309, 177 A.2d 545, the New Jersey Supreme Court was confronted with a similar problem of definition when the statute defined the person who was to appoint and also to serve as the "elected official who serves as the chief executive of the municipality, whatever his official designation may be." The question was whether this person was to be the mayor or the city manager under a city manager form of government. The court said

that the definition in the statute did not really fit either the mayor or the manager, for although the manager was the chief executive as that term is generally understood, he was not elected, and the mayor, although elected, was not the chief executive as that term is ordinarily used. The court held that the Legislature intended the mayor to be the appointing and serving power and said:

> "While it is the manager and not the mayor who is in the technical sense of the manager law the 'chief executive,' it is apparent the Legislative (sic) was using the term in the planning act in a broader connotation. It was seeking short language which would be applicable to all forms of local government and would tie in with the other criterion of 'elected official.' In fact, in most municipal forms — commission, borough, town, township—the mayor or other presiding officer (e.g., president of the board of trustees in villages, . . . ) is not 'the chief executive' at all, but legally only the titular head, whose powers are never full and vary greatly with the particular charter. He is 'the chief executive' solely in 'strong-mayor' plans, as under the Faulkner Act, N.J.S.A. 40:69A-39 et seq. . . . Consequently we are satisfied that the Legislature intended to put the appointing power in the mayor rather than in the manager."

So also in this case the legislature in using the term "chief executive officer" was using merely a shorthand expression that would be equally applicable to all types of government, and must have intended the mayor as the "chief executive officer" under the com-

mission form of government. This conclusion is buttressed by the contemporaneous construction and the long-continued administrative practice without exception since the inception of the plaintiff district. Such construction and application is entitled to great weight as hertofore argued under Point I with authorities cited therein which will not be repeated in this point. Defendants' contentions respecting the estoppel of plaintiff argued under Point I are also equally appropos to defendants' contentions in this point as well and will likewise not be repeated in this point.

## POINT III

### UNDER ANY INTERPRETATION OF SECTION 73-8-20, U.C.A., 1953, TITLE 22 OF THE REVISED ORDINANCES OF SALT LAKE CITY, UTAH, 1955, IS VALID UNTIL REPEALED.

Even if section 73-8-20, U.C.A., 1953, is construed in accordance with the reasoning of the trial court, still the court committed error in overturning the determination made by the governing body of Salt Lake City of the method of appointment. In other words the lower court adopted an inconsistent position. First it held that the governing body of Salt Lake City was to determine the appointment of the members of the board of directors of plaintiff, and then it declared invalid the solemn declaration that had been made by that self-same governing body of the method of exer-

cise of that power. The court stated in its ruling as heretofore quoted that the Board of Commissioners had engrafted a "gratuitous procedural rule" on the statute and that such was invalid. If this is merely a gratuitous procedural rule to govern the procedure of the Board of Commissioners, it is difficult to see how it can be invalid, for under the trial court's reasoning, the power exists in the Board of Commissioners to determine the method of appointment. If the court intended to lay down a rule that the Board cannot determine the method but must act simultaneously, certainly such rule is unreasonable for an orderly procedure requires that someone must have the responsibility for making the initial nomination to plaintiff's board. The entire Board of Commissioners cannot be expected to simultaneously place a single person in nomination. The procedure set out by the Board of Commissioners for appointment of directors to plaintiff district in Title 22 of the Revised Ordinances of Salt Lake City, Utah, 1955, is certainly a valid and proper exercise of the power and should be subject only to repeal or a new enactment by the Board of Commissioners. Since the original determination was made by ordinance, this determination can be modified or changed only by another ordinance. It cannot be repealed by any act with less dignity and formality than the original ordinance. Rhyne, *Municipal Law,* Section 9-8, p. 234, citing *Swindell v. State,* 143 Ind. 153, 42 N.E. 528, 35 L.R.A. 50 (1895); *Coral Gables v. Miami,* 138 Fla. 881, 190 So. 427 (1939); *Litchfield v. Hart,*

306 Ill. App. 621, 29 N.E. 2d 678 (1940); *Stratton v. Warrensburg,* 237 Mo. App. 280, 167 S.W. 2d 392 (1942); *Tacoma v. Lillis,* 4 Wash. 797, 31 P. 321, 18 L.R.A. 372 (1892). Title 22 under the trial court's interpretation of the statute should be valid until repealed and the trial court erred in striking it down, even after reaching its conclusion respecting the method of appointment.

## POINT IV

## IN ANY EVENT THE APPOINTMENT OF THORPE B. ISAACSON IS A VALID APPOINTMENT.

The action of the Salt Lake City Commission set out in the Statement of Facts reflecting the appointment of Thorpe B. Isaacson proves without any doubt that such appointment was regularly made by the Board of Commissioners at a regular meeting and is not subject to challenge under any interpretation of the statutes and ordinances. The argument of plaintiff accepted by the trial court to the effect that such appointment was not the free act of the Board of Commissioners, because they were laboring under an alleged erroneous interpretation of the law as set forth in the City Attorney's opinion dated June 20, 1961, (Exhibit 1, herein) is without merit. If the Board of Commissioners were laboring under any mistake at all, it was a mistake of law and not a mistake of fact. The universal rule is that an act resulting from an erroneous

interpretation of law is not subject to correction by the courts. 19 *American Jurisprudence,* Equity, Sec. 63, p. 81; Ibid., Sec. 72, p. 87. If the solemn actions of governmental bodies are to be set aside every time they act upon erroneous advice, then there will be no stability at all in matters of business and commerce and government and no one will be able to rely upon the action of any deliberative body. In this case, if the Board of Commissioners had desired to question the validity of the interpretation of section 73-8-20 by the city attorney they could have done so easily by refusing to make any appointment at all to the board of directors of plaintiff until such time as that interpretation had been tested by the court. However, in this case they acted regularly and formally in approving the appointment of defendant Isaacson to plaintiff's Board of Directors and he should be seated forthwith by this court through the use of its power of mandamus.

## CONCLUSION

This court should set aside the determination of the lower court that the first portion of Section 73-8-20 is not applicable to appointments to plaintiff, and should declare the law to be that nominations to plaintiff's board of directors are to be made by the Mayor as the chief executive officer of Salt Lake City, with the consent and approval of the Board of Commissioners as the governing body in accordance with statute and ordinance. The court should also determine that de-

fendant Thorpe B. Isaacson has been validly appointed and issue its writ of mandate to plaintiff directing it to seat defendant Isaacson on its board of directors forthwith.

Respectfully submitted,

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